IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-721

ARTHUR F. QUERN, Director of the Illinois Department of Public Aid, individually and in his official capacity, and VIVIAN O'MALLEY, individually and as agent of the Illinois Department of Public Aid,

Appellants,

v.

JUAN HERNANDEZ and MARIA HERNANDEZ, individually and on behalf of all other persons similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF
For Appellants Quern and O'Malley

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APPELLANTS APPEAL FROM A FINAL ORDER WITHIN THE TIME PERMITTED BY STATUTE

The legislative history of the statutory provisions pertaining to three-judge district courts, 28 U.S.C. §§2281-84 [hereinafter three-judge court statutes], indicates that Congress devised the three-judge court statutory scheme in order to protect state and federal legislation from "improvident doom", on constitutional grounds, at the hands

of a single federal district court judge. *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 804, 43 L. Ed. 2d 636 (1975).[1] It is submitted that due deference to the congressional intent underlying the enactment of the three-judge court statutes dictates that the permanent injunction which was entered by the three-judge court in this case, enjoining the enforcement of a state statute, was a final order which was directly appealable under §1253.

[1] As stated by the Senate Committee on the Judiciary, in its report that was dealing with the bill that was to become the Act of August 12, 1976 (S. Rep. No. 94-204, 94th Cong., 1st Sess., 1975, p. 2):

> "The provision for three-judge courts was enacted by Congress as a solution to a specific problem. In 1908, the Supreme Court, in the landmark decision of *Ex parte Young*, 209 U.S. 123 (1908), held that State officials could be enjoined by Federal courts from enforcing unconstitutional State statutes. The *Young* decision came at the turn of the century, at a time of vigorous expansion of big business and the railroads. As the States sought to exert control over these enterprises, they enacted regulatory statutes. Repeatedly, however, their attempts were thwarted by Federal court injunctions preventing enforcement of these statutes. Most controversial was the practice of many Federal judges of granting interlocutory injunctions on the strength of affidavits alone or of granting temporary restraining orders ex parte, i.e., without hearing or notice to the opposing side.
>
> "As a response, Congress enacted the Three-Judge Court Act (Act of June 18, 1910, ch. 309, §17, 36 Stat. 577) which prohibited a single Federal district court judge from issuing interlocutory injunctions against allegedly unconstitutional State statutes and required that cases seeking such injunctive relief be heard by a district court made up of three judges. The act also contained a provision for direct appeal to the Supreme Court in the belief that this would provide speedy review of these cases. The rationale of the act was that three judges would be less likely than one to exercise the Federal injunctive power imprudently. It was felt that the act would relieve the fears of the States that they would have important regulatory programs precipitously enjoined. . . .
>
> ". . . The original act dealt only with interlocutory, and not permanent injunctions. A 1925 amendment to the act required that three judges convene for permanent as well as interlocutory injunctions."

Recognizing the congressional intent underlying the three-judge court statutes, this Court has attempted to construe its jurisdiction under §1253 in a manner consistent with both the congressional policy favoring accelerated review of three-judge court orders granting or denying injunctive relief and the equally significant congressional concern for minimizing the Supreme Court's docket. *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 98-99, 42 L. Ed. 2d 249 (1974).

In *Goldstein* v. *Cox,* 396 U.S. 471, 90 S. Ct. 671 (1970), this Court held that its jurisdiction over interlocutory orders under §1253 "is confined to orders granting or denying a preliminary injunction." (*Goldstein,* 90 S. Ct. at 675). It follows that an interlocutory order granting a permanent injunction would not be appealable under this section. Thus, a determination by this Court that the order appealed from in this case is an interlocutory order would necessarily result in a finding that review under §1253 is not proper because the order entered here granted a permanent, rather than a preliminary, injunction. This interpretation leads to the incongruous result that *all* orders granting preliminary injunctions would be directly appealable under this section (since they are always interlocutory), but a significant number of orders granting permanent injunctions would be denied an accelerated determination simply because an ancillary claim is remanded to a single district judge for determination. Such a result is directly contrary to the congressional intent manifested in the enactment of the three-

judge court statutes. It is clear that an injunction granting permanent relief enjoining the operation of a state statute on constitutional grounds must necessarily have been final in its effect and could not have been awarded in the absence of a final determination on the merits in plaintiffs' favor.

It is submitted that the rule in *Liberty Mutual Insurance Co.* v. *Wetzel,* 424 U.S. 737, 47 L. Ed. 2d 435 (1976) is not applicable to this case. *Liberty Mutual* was not an appeal under §1253 and did not involve an order granting or denying a permanent injunction. Furthermore, if the order of the three-judge court in the instant case is not considered "final", the appellant will be faced with the anomaly of either a bifurcated appeal or the loss of the right to a direct appeal under §1253 since the "final" order would be entered by a single judge.

As noted by this Court in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 8 L. Ed. 2d 510, 524-25 (1962),

> * * * The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered "final." [citations] A pragmatic approach to the question of finality has been considered essential to the achievement of the "just, speedy, and inexpensive determination of every action": the touchstones of federal procedure.

While this Court has seldom considered the finality of an order under §1253 (*Brown Shoe, supra*), there have been numerous decisions discussing the finality of a state court order in appeals under §1257. See: *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 125-26, 89 L. Ed. 2092 (1944); *Mills* v. *Alabama,* 384 U.S. 214, 16 L. Ed. 2d 484 (1966); *Hudson Distributors Inc.* v. *Eli Lilly & Co.,* 377 U.S. 386, 12 L. Ed. 2d 394 (1964); *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.,* 414 U.S. 156, 38 L. Ed. 2d 379 (1973). This Court has noted that the finality requirement of §1257 serves several ends: avoidance of piecemeal review, avoidance of advisory opinions and promotion of minimum federal intrusion into state affairs. (*North Dakota State Bd. of Pharmacy,* 38 L. Ed. 2d at 383). However, this Court has also recognized that in some situations, where intermediate rulings "may carry serious public consequences," a departure from this requirement of finality for federal appellate jurisdiction is justified. (*Ibid.*) It is submitted that a consideration of the foregoing factors should result in a determination that this case is one which requires an immediate review.

Unlike the situation where this Court is asked to review an intermediate state court order under §1257, review under §1253 would serve to minimize federal intrusion into state affairs. Furthermore, the remaining claim does not raise any other federal questions which could be reviewed by this Court, so to allow review at this stage of the litigation will not offend the objection against fragmentary review. (*Radio Station WOW,* 89 L. Ed. at 2092). Therefore, the general requirement of finality for federal appellate review should not operate to deny an expedited determination of the ruling of the three-judge court in the instant case.

In *New York* v. *Cathedral Academy,* ..... U.S. ....., 54 L. Ed. 2d 346 (1977) this Court held that an order of the Court of Appeals of New York was final, despite the fact that the Court of Appeals had remanded the case to the Court of Claims for a determination of the amount of damages, based upon the fact that the decision of the Court of Appeals "finally determined the federal constitutional issue" (*Id.* 54 L. Ed. 2d at 351). Likewise, in this case there can be no doubt that the decision of the three-judge court

finally determined the federal constitutional issue involved in the litigation. Therefore, this Court should find that the order was directly appealable under §1253.

Finally, it is submitted that the order of the three-judge court entered in the instant case "had sufficient indicia of finality" for this Court to hold that this judgment is properly appealable.[2] This order contained a final determination that various sections of the Illinois Attachment Act are unconstitutional under the Fourteenth Amendment to the United States Constitution. County Defendants were ordered to return all property of plaintiffs and release all other property attached pursuant to this Act. All clerks were permanently enjoined from issuing writs of attachment and all sheriffs were likewise enjoined. The State defendants were enjoined from authorizing writs of attachment. (See: Jurisdictional Statement, p. A2). Each of the foregoing orders is final in nature and such orders could not have been entered unless the Court made a final determination that plaintiffs were correct on the merits of the constitutional claim. Under these circumstances, a remand of a claim for damages to a single district judge should not operate to deprive defendants of a direct appeal to this Court under §1253.

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[2] It is interesting to note that this Court previously heard argument in this case when it was in exactly the same posture. The order from which an appeal was taken in the instant case is the same order entered by the three-judge court in the original action on December 15, 1975. Defendants did not file their Notice of Appeal from the December 15, 1975 order until February 3, 1976 (50 days after the order was entered). The appeal was docketed on April 3, 1976, and probable jurisdiction was noted on September 7, 1976. The case was decided by this Court on May 31, 1977 without consideration of the question of whether this Court had jurisdiction to hear the appeal under §1253.

CONCLUSION

For the foregoing reasons, appellants believe that the questions presented by this appeal are substantial and of broad importance and application. Appellants, therefore, respectfully urge this Honorable Court to give this case its full consideration and reverse the district court's judgment.

Respectfully submitted,

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